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STATUTE OF LIMITATIONS AS A BAR TO AN ACTION BY A CORPORATION AGAINST NEGLIGENT DIRECTORS FOR MISMANAGEMENT OF THE CORPORATE AFFAIRS.—The liability of directors for negligent or wilful mismanagement of the corporate affairs is a purely legal claim cognizable in a court of law. The wrong is against the corporation and not against the shareholders, though the latter may be injured indirectly. The right to claim damages for the injury is therefore primarily in the corporation. The action must be instituted in the corporate name by the managing officers, or, if the corporation is insolvent or in the process of dissolution, the action may be brought by the receiver, acting for and representing the corporation. But if the managing officers refuse for some reason to enforce the rights of the corporation, then equity will permit a suit by the stockholders as such against the parties obligated to the corporation.[1] Thus, the wrong being a purely legal claim, the statute of limitations will run in favor of the directors and bar the action if not brought within the statutory period, whether in form of a suit in equity or an action at law.[2]

In the recent case of *Ventress* v. *Wallace* (Miss.), 71 South. 636, the directors of a bank set up the statute of limitations in defense to a suit by the receiver of the bank to recover damages for losses caused by the negligent mismanagement of the affairs

[1] See Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 153 S. W. 448, 24 Am. St. Rep. 625; MORAWETZ, PRIV. CORP., § 516.
[2] See Wallace *v.* Lincoln Sav. Bank, *supra;* THOMPSON, CORP., § 1986.

of the corporation, resulting in the bank's insolvency. The court disposed of the issue upon principles of trust relationship and concealed fraud, stating the better rule to be that the statute does not begin to run in favor of a director until he surrenders his office, and ruling that the statute would not bar the suit since it was instituted by the receiver within a reasonable time from his appointment. Let us consider the application of the principles stated in this case: (1) The theory of trust relationship existing between the directors and the corporation and the shareholders; (2) The doctrine of concealed fraud as applied to the statute of limitations.

The directors and supreme managing officers of a corporation are constantly referred to in the decisions and by text-book writers as "trustees" for the corporation and the shareholders. The use of the term "trustee" is somewhat inaccurate and plainly misleading. The directors cannot be in a strict sense trustees, since they neither hold the legal title to the corporate property nor to the shares of stock. Nevertheless, it is well established by the decisions that they occupy a position of trust and confidence both to the corporation and to the shareholders.[3] The corporation is itself a legal entity holding title, both legal and equitable, to all the corporate property. The shareholders possess both the legal and equitable title to their respective shares of stock, but have no special authority over the property of the corporation. The directors have full power and control over the property and management of the affairs of the corporation. Thus it may be said that there exists a strong fiduciary relation between the directors and the corporation in reference to the corporate property, and between the directors and the shareholders in respect to their shares of stock. But there is no relation of trust and confidence, having for its subject matter the corporate property, between the directors and the shareholders.[4]

Express trusts are those trusts created by express terms as distinguished from trusts inferred by operation of law. The trustee and the beneficiary of an implied trust are neither parties nor privies to an express declaration of trust, but the relation arises from the acts or relations of the parties in regard to the subject matter. It is a settled rule that express trusts do not fall within the scope of the statute of limitations. The possession of the trustee is presumed to be the possession of the *cestui que trust,* while as to implied trusts the possession of the trustee is adverse to the *cestui que trust*. The statute of limitations will work a complete bar to a claim based on an implied trust, unless special circumstances alter the case.[5] The strong fiduciary relation which may

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[3] Spering's Appeal, 71 Pa. St. 11, 10 Am. Rep. 684; Stewart *v.* Harris, 69 Kan. 498, 77 Pac. 277, 105 Am. St. Rep. 178, 66 L. R. A. 261.

[4] See 3 POMEROY, EQ. JUR., 3 ed., §§ 1090, 1091.

[5] See Cooper *v.* Hill, 94 Fed. 582; Hayden *v.* Thompson, 71 Fed. 60, 69. For general discussion see Kane *v.* Bloodgood (N. Y.), 7 Johns. Ch. 90, 11 Am. Dec. 417; Landis *v.* Saxton, 105 Mo. 486, 16 S. W. 912, 24 Am. St. Rep. 403.

exist between a principal and his agent, a corporation and its directors, and the like, is merely a *quasi*-trust relationship, though courts of equity under certain circumstnces will apply to them principles analagous to those governing trustee and *cesqui que trust.*[6] In the case of *Ventress* v. *Wallace, supra,* the court expressly stated in the opinion that it was not its purpose to declare the directors of the corporation trustees of an express trust. And it seems to be the prevailing view that the directors of a corporation are not such express trustees as to be precluded from setting up the statute of limitations against a claim upon them for losses due to their official misconduct.[7] The contrary has been held as to a savings bank and its depositors, probably due to the peculiar status of such organization.[8]

Though it seems to be undoubtedly true that the directors are not trustees in the sense that prevents them from claiming the benefits of the statute of limitations, yet the question still arises as to when the statute will begin to run in favor of the director. The doctrine of concealed fraud plays an important part in determining the answer to this question. The injured corporation must first be given an opportunity to redress the wrong. It is through the directors that the corporation acts, and they alone can enforce its rights. Thus, in *Ventress* v. *Wallace, supra,* no action could have been instituted unless the officers or directors themselves had taken the ini-

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[6] See Bosworth *v.* Allen, 168 N. Y. 157, 61 N. E. 163, 85 Am. St. Rep. 667, 55 L. R. A. 751.

[7] Emerson *v.* Gaither, 103 Md. 564, 64 Atl. 26, 8 L. R. A. (N. S.) 738, 7 Ann. Cas. 1114; Landis *v.* Saxton, *supra.*

[8] In Williams *v.* McKay, 40 N. J. Eq. 189, 53 Am. Rep. 775, the decision was that the directors of a savings bank are trustees for the depositors, and that the statute of limitations does not run against a claim for injury by negligence on their part. "In reaching this conclusion the principle so often stated in the decisions and text-books is in nowise contraverted, that a trust to be exempt from the operation of the statute of limitations, must be of a nature to stand the triple test, viz: first, it must be a direct trust; second, it must be of a kind belonging exclusively to the jurisdiction of a court of equity; and third, the question must arise between the trustee and the *cestui que trust.* And in each of these respects, the present case harmonizes with the standard. If it is a trust at all it certainly is a direct one, for it arises immediately upon the placing of the funds under the control of this body of officers. Such a transaction has nothing of the nature or qualities of those indirect trusts that require for their creation a decree in a Court of Chancery * * *. It will be also observed that the transaction exhibits the second and third requisites of a trust, insomuch as the right of the depositors to look to the managers for reparation when a loss has been occasioned by their default, is an equitable one, cognizable only in a court of conscience, and the present proceeding is between the trustee and the legal representative of the *cestui que trustent.*" The relation existing between the corporation and its trustees is mainly that of principal and agent, and the relation between the trustess and depositors is similar to that of trustee and *cestui que trust.* Hun *v.* Cary, 82 N. Y. 65, 70. See also, Greenville Sav. Bank *v.* Abercrombie, 211 Mass. 252, 97 N. E. 897, 39 L. R. A. (N. S.) 173, Ann. Cas. 1913B, 420.

tiative, and this, as a matter of fact, would have placed them in the position of suing themselves. Nor can the corporation be charged with knowledge of the wrongful acts of the directors so that the statute would begin to run from the date of the commission of the wrong. It is a well established rule that mere ignorance of facts alone will not prevent the operation of the statute whether at law or in equity. But if the action is concealed by fraud, or if the facts upon which the action is based are concealed, then the statute of limitations will not begin to run until the discovery of the wrongs, there being no negligence or lack of diligence on the part of the parties aggrieved.[9] Especially is this true in courts of equity. Equity will not allow one to profit by his own wrong. In absence of special statutory exceptions, it is held by some courts that the concealment does not postpone the running of the statute in courts of law.[10] But the weight of authority seems to follow the equitable rule.[11] Modern statutes usually provide when the statute should begin to run in cases of fraud and concealment, and by the single system of pleading in code states this difficulty is somewhat obviated. This rule seems in accord with reason and the principles of justice, and is applied to the liability of the directors of a corporation for a breach of their duties as *quasi*-trustees.[12]

THE CY PRES DOCTRINE AND THE SCOPE OF ITS APPLICATION.—One of the most important functions exercised by courts of chancery, in the administration of charitable trusts, is found in the so-called doctrine of *cy pres*. In their zeal to sustain charitable trusts, the courts which recognize the doctrine have sometimes applied the principle under very questionable circumstances, extending its meaning to include any case in which the original purpose of the donor becomes impracticable. The doctrine of *cy pres* may be stated in general terms as follows: When there is an intent expressed on the part of the donor to devote a gift to charities in

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[9] See Lewey *v.* Fricke Coke Co., 166 Pa. St. 536, 31 Atl. 261, 45 Am. St. Rep. 684, 28 L. R. A. 283; 2 POMEROY EQ. JUR., 3 ed., § 917 and note.

[10] For an excellent discussion of this subject, showing the conflict of the authorities and the law in Virginia, see Rowe *v.* Bentley, 29 Gratt. 756. In the course of the opinion Burks, J. said: "In the cases of fraud the authorities are conflicting, as to whether at law the statute begins to run from the commission of the fraud, or from its discovery * * *. In equity, however, it would seem to be well settled that the statute begins to run only from the discovery of the fraud * * *." See also, Rice *v.* White, 4 Leigh 474; Fant *v.* Fant, 17 Gratt. 14.

[11] See Cook *v.* Chicago, etc., R. Co., 81 Iowa 551, 46 N. W. 1080, 25 Am. St. Rep. 512, 9 L. R. A. 764; Hughes *v.* Waynesburg First Nat. Bank, 110 Pa. St. 428, 1 Atl. 417.

[12] See Brinckerhoff *v.* Roosevelt, 143 Fed. 478. In Ventress *v.* Wallace, *supra*, though not necessary to decide the case, it was said: "We think the ruling that the statute of limitations does not begin to run in favor of a director in a case of this kind until he surrenders his office is the more reasonable and supported by better authority."